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Nos. 92-1392 and 92-1395

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

WALTER ROERS, in his official capacity as Director of the Disability Determination Services; R. JANE BROWN, in her official capacity as Commissioner of the Minnesota Department of Jobs and Training, PETITIONERS,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 42 U.S.C. § 1983 authorizes respondents to sue officials of a state agency, created pursuant to state law, who make initial and reconsideration decisions on claims for Social Security disability benefits, for violations of federal law and the United States Constitution.

2. Whether, even if respondents could not proceed under 42 U.S.C. § 1983, the federal district court nevertheless had jurisdiction to consider respondents' claims against the state agency officials.

3. Whether the court of appeals was correct in waiving exhaustion of administrative remedies for a class of Social Security disability claimants, where, absent waiver, the challenged practices would never be subject to judicial scrutiny, where requiring exhaustion would cause irreparable harm, and where respondents' claims were collateral to their claims for disability benefits.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

JURISDICTION 2

STATEMENT 2

REASONS FOR DENYING THE WRIT 7

I. Introduction 7

II. The Petitions Should be Denied as to the Section 1983 Questions. 8

A. The Color of State Law Issue Does Not Warrant Review. 8

B. The Court Should Not Issue a Writ of Certiorari to Decide Whether Congress Clearly Intended to Preclude a Remedy Under Section 1983. 16

III. The Petition Should Be Denied as to the Section 405(h) Question. 21

IV. The Petition Should be Denied as to Waiver of Exhaustion of Administrative Remedies Under Section 405(g). 22

CONCLUSION 28

TABLE OF AUTHORITIES

Page

Cases

Adams v. Weinberger, 548 F.2d 239 (8th Cir. 1977) 3, 5, 7

Albright v. Longview Police Dept., 884 F.2d 835 (5th Cir. 1989) 14

Bailey v. Sullivan, 885 F.2d 52 (3d Cir. 1989) 24

Boring v. Sullivan, No 2:91-0429 (S.D.W.Va.) 12

Bowen v. City of New York, 476 U.S. 467 (1986) 8, 22-28

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R., 389 U.S. 327 (1967) 15

Califano v. Yamaaski, 442 U.S. 682 (1979) 18

City of New York v. Heckler, 578 F. Supp. 1109 (E.D. N.Y. 1984) 25

City of New York v. Heckler, 742 F.2d 729 (2d Cir. 1984) 27

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949) 27

Council for Periodical Distributors Ass'ns v. Evans, 827 F.2d 1483 (11th Cir. 1987) 12

Department of Banking v. Pink, 317 U.S. 264 (1942) 2

Ellis v. Blum, 643 F.2d 68 (2d Cir. 1981) 9, 10, 13

Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989) 18, 19

Grant v. Shalala, No. 91-5675 (3d Cir. March 5, 1993) 23

H. Christiansen & Sons v. City of Duluth, 225 Minn. 475 (1948) 10

Hamilton-Brown Shoe Co. v. Wolf Bros., 240 U.S. 251 (1916) 15

Hensley v. Eckerhart, 461 U.S. 424 (1983) 11

Hyatt v. Heckler, 807 F.2d 376 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987) 24

International Society for Krishna Consciousness v. Air Canada, 727 F.2d 253 (2d Cir. 1984) 14

Jones v. Califano, 576 F.2d 12 (2d Cir. 1978) 26

Jose P. v. Ambach, 669 F.2d 865 (2nd Cir. 1982) 12

Kuehner v. Schweiker, 717 F.2d 813 (3d Cir. 1983), *vacated and remanded on other grounds*, 469 U.S. 977 (1984) 10, 11, 13

Marcus v. Sullivan, 926 F.2d 604 (7th Cir. 1991) 24

Mathews v. Eldridge, 424 U.S. 319 (1976) 24-27

Menial Health Ass'n v. Heckler, 720 F.2d 965 (8th Cir. 1983) 22

Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1 (1981) 17-20

Monroe v. Pape, 365 U.S. 167 (1961) 16

NCAA v. Tarkanian, 488 U.S. 179 (1988) 15, 16

New York v. Sullivan, 906 F.2d 910 (2d Cir. 1990) 23

Newman v. Piggie Park Enterprises, 390 U.S. 400 (1968) 11

Patsy v. Bd. of Regents of State of Florida, 457 U.S. 496 (1982) 12

Polaski v. Heckler, 751 F.2d 943 (8th Cir. 1984), *remanded* 476 U.S. 1167 (1986), *on remand*, 804 F.2d 456 (8th Cir. 1986), *cert. denied*, 482 U.S 927 (1987) 23

Rosado v. Wyman, 397 U.S. 397 (1970) 19

Schweiker v. Chilicky, 487 U.S. 412 (1988) 17

Smith v. Robinson, 468 U.S. 992 (1988) 13, 17-20

Sullivan v. Finkelstein, 496 U.S. 617 (1990) 21

Sullivan v. Zebley, 493 U.S. 521 (1990) 23

Suter v. Artist M., U.S. , 112 S.Ct. 1360 (1992) 17, 19

U.S. v. Classic, 313 U.S. 299 (1941) 15

Weinberger v. Salfi, 422 U.S. 749 (1975) 26

Wilder v. Virginia Hospital Assoc., 496 U.S. 498 (1990) 18, 21

Wright v. Roanoke Redevelopment & Hous. Auth.,
479 U.S. 418 (1987) 18, 19

Statutes and Regulations

28 U.S.C. § 1331 . . . . . 10, 11

28 U.S.C. § 1361 17

28 U.S.C. § 1367(a) 10

28 U.S.C. § 2412(d) 12

42 U.S.C. § 405(g) . . . . . *passim*

42 U.S.C. § 405(h) 9, 21, 22

42 U.S.C. § 421(a) 15

42 U.S.C. § 421(e) 12

42 U.S.C. § 421(k)(1) 26

42 U.S.C. § 1983 . . . . . *passim*

42 U.S.C. § 1988 11

20 C.F.R. Pt. 404, subpt. P, App. 1, Listing 12.09 . . . . . 6, 7

20 C.F.R. Pt. 404, Subp. P, App. 1, Listing 112.09 6

20 C.F.R. § 404.1613(a) 10

20 C.F.R. § 404.1615(g) 12

20 C.F.R. § 416.1013(a) 10

20 C.F.R. § 416.1015(g) 12

56 Fed. Reg. 33,130 (July 18, 1991) 6

Minn. Stat. § 268A.03(d) 14, 15

Miscellaneous

Staff of House Comm. on Ways & Means. 102d Cong., 2d Sess., Overview of Entitlement Programs 61 (Comm. Print 1992) 4, 23, 26

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On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully submit this brief in opposition to the petitions for writs of certiorari submitted on behalf of the Secretary of Health and Human Services (Secretary) and the state agency officials.

JURISDICTION

The Secretary and the state petitioners each filed applications for an extension of time to file their petitions for a writ of certiorari. Justice Blackmun granted those applications in two separate orders, extending the time to February 8, 1993.

The Solicitor General, "on behalf of the Secretary," filed a second application for an extension of time to file her petition. Application at 1 (January 1993). On February 1, 1993, Justice Blackmun granted the Secretary's application, extending the time for the Secretary to file her petition to February 22, 1993. The Secretary's petition was subsequently filed timely.

The state petitioners, unlike the Secretary, never filed an application for an extension beyond February 8, 1993, although the Secretary's application notes that: "The Attorney General of Minnesota joins in this [the Secretary's] application." *Id.* (emphasis added). In any event, Justice Blackmun's February 1, 1993 order, by its terms, extended only the Secretary's time to file.

The state petitioners took no further action to obtain an extension beyond February 8, 1993. Their petition, which was filed on February 22, 1993, was untimely and should be dismissed on this ground alone. *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942).

STATEMENT

Respondents brought this class action for declaratory and injunctive relief on behalf of applicants and recipients for Social Security disability benefits and Supplemental Security Income, who allege that they are unable to work in whole or in part because of alcoholism or some other drug dependency, and whose claims had been denied at the initial

or reconsideration level of the administrative appeal process. C.A. App. 13.[1] They alleged that the standard used by the state Disability Determination Service (DDS) to evaluate their claims differed from the standard used by the Secretary's Administrative Law Judges (ALJs), and was inconsistent with the Social Security Act as it had been interpreted by the Eighth Circuit in *Adams v. Weinberger*, 548 F.2d 239 (8th Cir. 1977). C.A. App. 21. They also claimed that the state agency failed to gather and develop evidence fully as required by the Act. *Id.* Finally, they asserted that the Secretary's policies and procedures violated their rights to equal protection and due process guaranteed by the United States Constitution. *Id.* at 21-22.

When respondents filed their complaint in January, 1990, they sued only the Secretary of Health and Human Services; they did not assert any claims against the state agency officials. *Id.* at 11. The evidence then available to respondents suggested that the challenged policies were attributable to the Secretary. The Secretary, for example, had advised the ALJs in her Office of Hearings and Appeals of the Eighth Circuit's decisions governing the evaluation of alcoholism, but had never similarly advised state agency employees.[2] Subsequent discovery suggested, however, that some of the systemic problems relating to the gathering and development of evidence were attributable to the state agency.

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[1]C.A. App. refers to the Joint Appendix filed in the court of appeals. C.A. Supp. App. refers to the Supplemental Appendix attached to respondent Schoolcraft's Eighth Circuit brief.

[2] The official manual used by the Office of Hearings and Appeals advised ALJs in Minnesota about significant 8th Circuit case law. C.A. Supp. App. 14-16. In stark contrast, supervisory employees at DDS testified that they had not been aware of the *Adams* decision, and had not been instructed by SSA that, in evaluating a claim of disability on the basis of substance abuse, they must determine whether a claimant can voluntarily control his use of the substance as required by *Adams*. C.A. App. 360-63, 367-71.

Since the district court had ordered that all amendments be filed before April 1, 1990, respondents amended their complaint to assert a claim against state agency officials. Docket No. 15, C.A. App. 4; C.A. App. 88.

Although the petitioners describe the multi-level administrative review procedures in some detail, they omit two important points. First, two-thirds of all disability claimants do not appeal beyond the initial and reconsideration decisions made by the state DDS officials. Staff of House Comm. on Ways & Means, 102d Cong., 2d Sess., Overview of Entitlement Programs 61 (Comm. Print 1992) (hereafter 1992 Green Book). Second, disability claimants must wait an average of 14 months for an ALJ decision. C.A. App. 331, 259-262. Thus, even those claimants who do appeal are seriously harmed by erroneous state agency decisions.

The petitioners misrepresent respondents' position in two ways. First, with respect to the underlying claim, respondents do not allege that "a claimant must be conclusively deemed disabled once it is determined that he or she 'is addicted and has lost the ability to voluntarily control the use of alcohol/drugs.'" Secretary's Petition for a Writ of Certiorari (hereafter Sec. Pet.) at 9. Respondents have clearly acknowledged that the Social Security Act requires "a causal relationship between an impairment and the inability to work." Appellants' C.A. Brief at 7. Respondents claim that a claimant is eligible for disability benefits if he or she is addicted, has lost the ability to voluntarily control the use of alcohol, and as a result, is unable to work.

Second, the Secretary continues to argue that "[r]espondents asserted that the errors allegedly made by Minnesota DDS were being corrected by ALJs." Sec. Pet. at 21. This is patently false. Respondents repeatedly argued the contrary in both the district court

and the court of appeals. "[A]lthough exhaustion of administrative remedies will often result in the award of benefits [to class members], it never removes or corrects the systemic errors at the initial and reconsideration stage of the administrative process." Appellants' C.A. Brief at 31; Appellants' Response to Petitions for Rehearing at 8. ALJs decide whether a particular claimant is disabled; they do not, however, consider or address the validity of the practices and procedures used by the state DDS officials.

The experience of Joseph Drumbeater, a named plaintiff, is illustrative. Mr. Drumbeater had applied for SSI on November 29, 1988. His application was denied in an initial decision on February 28, 1989, and in a reconsideration decision on June 23, 1989. In making these decisions, DDS failed to gather Mr. Drumbeater's treatment records, and failed to apply the standard set forth in *Adams v. Weinberger*, *supra*. C.A. App. 68-74. Mr. Drumbeater filed a timely request for an ALJ hearing, and received a favorable decision on March 12, 1990, sixteen months after he applied.[3] *Id.* at 345-352. The ALJ first concluded that Mr. Drumbeater's alcohol dependence did not meet the requirements of Listing 12.09. *Id.* at 349; *see infra* p. 6. The ALJ, applying the standard set forth by the Eighth Circuit in *Adams v. Weinberger*, 548 F.2d 239 (8th Cir. 1977), then concluded that Mr. Drumbeater was disabled. C.A. App. at 349-50.

The sole issue in Mr. Drumbeater's appeal was whether he was eligible for disability benefits under the Social Security Act. The ALJ had no authority to consider or rule on the practices and procedures employed by the state DDS office at the initial and

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[3]By the time the appeal in this case was heard by the Court of Appeals, all three named plaintiffs had been found disabled and eligible for benefits. The Secretary moved to dismiss the appeal as moot. The Court of Appeals denied the motion, and the Solicitor General has abandoned that argument here.

reconsideration levels. The ALJ did not consider either whether DDS had adequately gathered and developed the record or whether DDS had applied the proper standards when evaluating Mr. Drumbeater's disability.

Moreover, the ALJ hearing did not provide any means for preventing a recurrence of the irreparable harm Mr. Drumbeater suffered while waiting for his hearing. When DDS employees review his continuing eligibility, they will once again apply the very practices and procedures that respondents challenge in this litigation.

Finally, the petitioners fail to mention that, while the appeal was pending in the Eighth Circuit, the Secretary published proposed amendments to the adult mental impairment regulations. 56 Fed. Reg. 33,130 (July 18, 1991). The listing for substance addiction disorders is currently a "reference" listing. 20 C.F.R. Pt. 404, subpt. P, App. 1, Listing 12.09. Instead of identifying clinical signs and symptoms of a substance addiction disorder, it refers to other mental impairments that are to be used to determine whether a claimant who suffers from a substance addiction is eligible for disability benefits.

The proposed Listing 12.09, renamed "substance dependence disorders," is no longer a reference listing. Rather, for the first time, it lists the signs and symptoms which substantiate the presence of a disabling substance dependence disorder. 56 Fed. Reg. at 33,142. When the new Listing 12.09 is adopted, there will at long last be a specific regulation that establishes a framework for finding a claimant disabled based upon alcoholism alone.[4]

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[4]The Secretary has already published a new listing for substance dependence disorders in children which parallels proposed Listing 12.09. 20 C.F.R. Pt. 404, Subp. P, App. 1, Listing 112.09 (1992).

In addition to creating a separate listing for substance dependence disorders, the new listing will require consideration of the ability to control the use of alcohol or other substance, as required by *Adams*. One of the listed signs of a substance dependence disorder in the proposed regulation is: "Two or more unsuccessful efforts to cut down or control use." *Id.* (to be codified at 20 C.F.R. Part 404, subpt. P, App. 1, Listing 12.09). The promulgation of this proposed rule in final form, together with other changes in policy that have taken place during the pendency of this litigation, will go a long way toward resolving the underlying claims.

In a similar vein, the court of appeals noted that, in oral argument, the government had claimed that the Secretary currently complies with the legal standards and procedures respondents deem to be applicable. Sec. App. 18a.[5] The Court then stated: "[T]he Secretary can easily remedy this dispute and save everyone a great deal of time and expense by entering into a consent judgment in the district court specifically stating the applicable standards are to be applied to each stage of the claim evaluation process." *Id.*

REASONS FOR DENYING THE WRIT

I. Introduction

The decision of the court of appeals is in most respects fully consistent with all of the other circuits and, in all respects, fully consistent with decisions of this Court. Only with respect to one narrow issue does the decision below vary from any other circuit, namely, whether state agency officials who make disability determinations act under color of state law for the purposes of 42 U.S.C. § 1983. The petitioners attempt to magnify this narrow

[5]"Sec. App." refers to the Secretary's Appendix to her Petition for a Writ of Certiorari.

issue into one of major proportions and dire consequences for the entire Social Security system, in the hopes of convincing this Court to grant review and, in essence, overrule *Bowen v. City of New York*, 476 U.S. 467 (1986). As we show more fully below, whether or not the state agency officials act under color of state law, respondents have stated valid claims against the state petitioners over which the district court had jurisdiction. Even if the question relating to section 1983 were of greater significance, the current posture of this case makes it inappropriate for review. Rather, the Court should permit the case to be remanded to the district court for completion of discovery and trial, or, as we have indicated, a likely early settlement.

Whether or not the Court grants the petitions for certiorari with respect to the section 1983 question, the Court should deny review with respect to waiver of exhaustion of administrative remedies under 42 U.S.C. § 405(g). The Secretary concedes that there is no split in the circuits as to this question. To the contrary, the appellate courts have applied this Court's unanimous decision in *City of New York* without difficulty or disagreement. The Secretary's contention that the Eighth Circuit's decision is contrary to *City of New York* is wholly without merit.

II. The Petitions Should be Denied as to the Section 1983 Questions.

A. The Color of State Law Issue Does Not Warrant Review.

The Eighth Circuit recognized that respondents had stated a claim against the state petitioners under 42 U.S.C. § 1983. "Claimants allege that these state officers in their official capacities, acting under color of state law, violated federal law and the United States Constitution by failing to apply the proper criteria." Sec. App. 17a. On the basis of this allegation, the court concluded that there was federal question jurisdiction to consider these

claims. *Id.* In reaching this conclusion, the court rejected the state petitioners' argument that 42 U.S.C. § 405(h) bars federal question jurisdiction over them. *Id.* at 16a. The Court noted that section 405(h) applies only to officers and employees of the federal government, and held that the state officials were neither. *Id.* at 17a. In a footnote to this last holding, the Eighth Circuit stated that "we disagree with the holding of the Second Circuit that the state defendants are acting solely as agents of the United States. *See Ellis v. Blum*, 643 F.2d 68 (2d Cir. 1981)." *Id.*

In *Ellis v. Blum, supra*, the Second Circuit, like the Eighth Circuit here, was reviewing a dismissal for lack of jurisdiction. Although analyzing the issue differently, the Second Circuit agreed with the Eighth Circuit that section 405(h) did not preclude federal question jurisdiction over the plaintiffs' claims. Based upon the record before it, however, the court concluded that the state officials were acting under color of federal law and therefore could not be sued under section 1983.

For the following reasons, this Court should not grant the petitions for certiorari to resolve this minor disagreement between the circuits.

1. If the state petitioners do not act under color of state law, respondents can proceed with their claims against them under 42 U.S.C. §405(g). The petitioners each emphasize the close relationship between the Secretary and the state agency. Although neither expressly claims that there is an agency relationship, the state petitioner argues that "there is a seamless integration of the DDS into the benefit adjudication process under the Act with truly plenary control of the DDS by the SSA." State's Pet. at 13. The Secretary argues that the state officials "act on behalf of the Secretary and therefore stand in the shoes of her officers or employees . . . ." Sec. Pet. at 21 (citing *Ellis v. Blum).* Both petitioners

rely on the federal regulations which provide that a decision of the state agency at the initial and reconsideration levels is the determination of the Secretary. 20 C.F.R. §§ 404.1613(a), 416.1013(a). Under the petitioners' reasoning, respondents could bring their claims against the state agency officials pursuant to 42 U.S.C. §405(g).[6]

Furthermore, the supplemental jurisdiction statute now provides an alternative basis for bringing claims against the state DDS agency as a pendent party in federal court. 28 U.S.C. § 1367(a) (effective Dec. 1, 1990). Social Security claimants can bring a state law claim that DDS is violating federal law as part of a related action in federal court against the Secretary under section 405(g). *See*, e.g., *H. Christiansen & Sons v. City of Duluth*, 225 Minn. 475, 483-84 (1948) (recognizing a state law cause of action for violations of a federal statute); *see also Kuehner v. Schweiker*, 717 F.2d 813, 828 n.17 (3d Cir. 1983) (Becker, J. concurring), *vacated and remanded on other grounds*, 469 U.S. 977 (1984). Given these alternative bases of jurisdiction, the petitioners' claims of the disastrous consequences to the Social Security system unless this Court issues a writ of certiorari simply have no merit.

The insignificance of the state action issue in this context is further demonstrated by the fact that both the Second Circuit in *Ellis* and the Third Circuit in *Kuehner v. Schweiker*, *supra*, found that there was indeed federal question jurisdiction under 28 U.S.C. § 1331 over the Social Security claimants' causes of action against the state agency officials.[7] Thus, the bottom line reached by the Eighth Circuit, namely, that Social Security

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[6]The requirement of a "final" decision would be waived for the same reasons it was waived by the Eighth Circuit as to respondents' claims against the Secretary. *See infra* Part IV, pp. 22-28.

[7]The Second Circuit found 1331 jurisdiction because the claims against the state agency were separate and distinct from the claims against the Secretary. *Ellis*, 643 F.2d at 76. In (continued...)

claimants could bring a cause of action against state agency officials challenging the procedures that they use to evaluate claims of disability, is fully consistent with the result reached by all of the circuits that have considered the issue. The Social Security disability system remains fully operational, despite the fact that state agency officials have been and continue to be subject to suit.

2. Since respondents can proceed with their claims against the state petitioners even if they did not act under color of state law, whether this case is "cert. worthy" depends in part on the differences between bringing the claims against the state petitioners under section 1983 and section 405(g). There are two differences: the first relates to attorney's fees, and the second to the doctrine of exhaustion of administrative remedies. As we show below, neither is significant.

In any action brought pursuant to 42 U.S.C. § 1983, a prevailing plaintiff has a claim for attorney's fees under 42 U.S.C. § 1988. Section 1988 attorney's fees are generally awarded to prevailing plaintiffs, unless "special circumstances would render the award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)). Whether or not fees would ultimately be awarded against the state agency is a matter of pure speculation. If after a decision on the merits, it is determined that the state agency was merely complying with the Secretary's instructions, the state agency could argue that fees under section 1988 should be denied because the state

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[7](...continued)
Kuehner, the Third Circuit found 1331 jurisdiction over the claim that the state agency, consistent with the Secretary's instructions, was violating the Social Security Act. 717 F.2d 813, 816-17 (3d Cir. 1983), *vacated and remanded on other grounds*, 469 U.S. 977 (1984). Here, discovery is likely to establish that some of the claims against the state agency are distinct from the claims against the Secretary.

was free of any culpability. *See, e.g., Council for Periodical Distributors Ass'ns v. Evans*, 827 F.2d 1483, 1487 (11th Cir. 1987); *Jose P. v. Ambach*, 669 F.2d 865, 871 (2nd Cir. 1982). The court might well hold the Secretary, rather than the state agency, liable for attorney's fees under the Equal Access to Justice Act, 28 U.S.C. § 2412(d). Even if fees were awarded against the state agency, they would likely be reimbursed by the Secretary.[8] *See* 42 U.S.C. § 421(e); 20 C.F.R. §§ 404.1615(g), 416.1015(g). Given the wholly speculative nature of the attorney's fees question, the possibility that some day, in some case, some court might grant attorney's fees against a state DDS office does not justify review of the state action issue by this Court in this case.

The second difference between bringing a claim against the state agency under section 405(g) and section 1983 is that section 405(g) contains a statutory, although waivable, requirement of exhaustion of administrative remedies, while under section 1983, exhaustion is not required. *Patsy v. Bd. of Regents of State of Florida*, 457 U.S. 496 (1982). In cases like the instant case where the claim involves the practices and procedures used by the state DDS office at the initial and reconsideration levels only, and is collateral to any claim for benefits, exhaustion is not required under section 405(g). *See infra* Part IV pp. 22-28. Thus, whether the state DDS officials act under color of state law and are sued under section 1983, or whether they are sued under section 405(g), exhaustion of administrative remedies would not be required.

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[8]In *Boring v. Sullivan*, No 2:91-0429 (S.D.W.Va.), for example, a class of Social Security claimants challenged the failure of the state DDS office to assure that evaluations of residual functional capacity are performed by a physician, as required by federal regulations. After the district court denied the defendants' motions to dismiss, the parties stipulated to a settlement on the merits. Subsequently, the parties agreed to an amount of attorneys' fees, all of which were paid by the federal government.

The conclusion that state DDS officials act under color of state law under section 1983 would not open the floodgates to thousands of lawsuits by unhappy Social Security claimants. Where a claimant alleges only that the state agency's decision denying benefits was inconsistent with federal law, and that the decision should be reversed, a section 1983 action would be foreclosed on the ground that the Social Security Act provides the exclusive basis for review of the decision to deny benefits. *See Smith v. Robinson*, 468 U.S. 992 (1988).

The Secretary argues that allowing section 1983 actions against a state DDS office could disrupt the administration of the disability programs in two ways. Sec. Pet. at 17-18. Both are contrived. First, she argues that exposing state officials to lawsuits could discourage states from participating in the Social Security programs, irrespective of the potential liability for attorney's fees. The Secretary ignores the fact, however, that the Second Circuit in *Ellis* and the Third Circuit in *Kuehner* held, in the early 1980s, that Social Security claimants could sue state DDS officials. A handful of other state DDS officials have been sued in federal district court in the intervening years. *See* Sec. Pet. 17 n.10. Nonetheless, we know of no state that has stopped administering the disability programs.

States have strong incentives to perform Social Security disability determinations. Administering the Social Security disability system gives the states thousands of jobs to fill, all of which go to their own residents. Furthermore, it is in the state's financial interest to see that all persons eligible for Social Security benefits receive them. Persons found ineligible for Social Security disability benefits often receive assistance under state-funded welfare programs. In Minnesota, the statute which authorizes the Department of Jobs and Training to perform disability determinations provides: "It is the purpose of this

relationship [with the Social Security Administration] to permit the citizens of this state to obtain all benefits available under federal law . . . ." Minn. Stat. § 268A.03(d).

The Secretary's second argument is no more persuasive. She argues that the Eighth Circuit's decision would frustrate Congress's goal of uniform administration of the Act. Again, the Eighth Circuit's decision has no impact on the question of uniformity. There is no greater risk to uniformity when a court orders a DDS official to comply with the Social Security Act and regulations than when a court orders the Secretary to comply. To the contrary, litigation against DDS officials is likely to promote uniformity among the different states and among the different decision-making levels.

3. The court of appeals here was reviewing the dismissal of respondents' claims against the state petitioners for lack of jurisdiction. The facts in the record, viewed in a light most favorable to the plaintiffs, clearly support the Eighth Circuit's decision. *See infra* Part II.A.4., pp. 15-16. The state action question is, however, a mixed question of law and fact to be determined at trial. *See, e.g., Albright v. Longview Police Dept.*, 884 F.2d 835, 838 and n. 1 (5th Cir. 1989); *International Society for Krishna Consciousness v. Air Canada*, 727 F.2d 253 (2d Cir. 1984) (interlocutory appeal dismissed as improvidently granted). The parties should be permitted to complete discovery and present evidence on the issue.

The disagreement between the Second and Eighth Circuits on the "color of law" issue may not in fact be irreconcilable. Since both courts reached their conclusions on appeal from a dismissal for lack of jurisdiction, neither court had the benefit of full development of the relevant facts. When presented with the same fully developed factual record, the two courts of appeals might agree that the state DDS officials do (or do not) act under color of state law. Thus, even if this Court considers the question of whether the state

petitioner acts under color of state law or exclusively under color of federal law to be of great importance, the Court should wait until after the final decision on the merits when the record will be fully developed. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U.S. 251, 258 (1916).

4. Finally, the petitions for a writ of certiorari should be denied because the decision below on the state action issue was clearly correct. Section 1983 applies to every person who acts "under color of any statute, ordinance, regulation, custom, or usage . . . ." 42 U.S.C. § 1983. The suggestion that state agency officials do not act under color of state law is counterintuitive. The State of Minnesota has, by statute, chosen to administer the Social Security disability programs at the initial and reconsideration levels. Minn. Stat. § 268A.03(d). The Secretary would not permit a private entity to perform the functions carried out by the DDS office; the alleged wrongful conduct by the state agency is possible only because it is a state agency, clothed with the authority of the state. 42 U.S.C. § 421(a); *U.S. v. Classic*, 313 U.S. 299, 326 (1941).

Petitioners' argument here that the state officials do not act under color of state law is analogous to arguing in *NCAA v. Tarkanian*, 488 U.S. 179 (1988), that the University of Nevada did not act under color of state law when it sanctioned Tarkanian in accordance with the NCAA's "recommendations." Despite the acknowledged power and influence of the NCAA, both the majority and the dissent agreed that the University officials had acted under color of state law. 488 U.S. at 183, 199. The state petitioners, like the University of Nevada, have agreed to comply with the regulations and guidelines of another entity. Like the University, the state petitioners retain several options. They can simply

cease making disability determinations as to some or all categories of disability claims. Alternatively, they can continue to administer the disability programs and work within the federal quality assurance program to alter federal policies with which it disagrees. The state petitioners, like the University, act under color of state law.

The state petitioners clearly carry the state's "badge of authority." *Tarkanian*, 488 U.S. at 191 (quoting *Monroe v. Pape*, 365 U.S. 167, 172 (1961)). When DDS writes to a claimant to set up a consultative exam, to request additional information, or to get permission to obtain confidential information, it does so on official state agency stationery. C.A. App. 374. When DDS refers a claimant to a consultant it sends the consultant a state agency form advising the psychologist of the information needed. *Id.* at 372-73. DDS personnel are guided not only by the regulations and manual material issued by the Secretary, but also by a state agency manual, containing, for example, policies governing when a claimant should be referred to a consultant. C.A. App. 366. Petitioners have cited no decisions by this Court which support the startling proposition that state employees working in a state agency can be considered anything other than state actors. The decision of the Eighth Circuit permitting respondents to proceed with their claim against the state petitioners under section 1983 was correct.

B. The Court Should Not Issue a Writ of Certiorari to Decide Whether Congress Clearly Intended to Preclude a Remedy Under Section 1983.

The state and federal petitioners also argue an alternative ground for rejecting the court of appeals' decision that respondents have stated a claim under 42 U.S.C. §1983. Sec. Pet. at 18-19; State Pet. at 10-11. The petitioners argue that the Social Security Act establishes a remedial scheme which demonstrates Congress' intent to preclude a section 1983 remedy. On this issue, however, unlike the narrow question of whether the state

petitioner acts under color of state law, the petitioners cannot even allege a conflict among the circuits. Further, the Secretary does not assert that the Eighth Circuit's decision conflicts with any decisions of this Court.[9]

As a threshhold matter, the petitioners did not adequately preserve the question of whether Congress intended to foreclose a section 1983 action here. Both petitioners made this argument for the first time in their petitions for rehearing in the Eighth Circuit.[10] The Secretary argued that the comprehensive remedial schemes established by Congress foreclosed an action under section 1983. Secretary's Petition for Rehearing at 8 - 10. She relied, however, on *dictum* in *Suter v. Artist M.*, _ U.S. _, 112 S.Ct. 1360 (1992) and on *Schweiker v. Chilicky*, 487 U.S. 412 (1988), a case addressing whether a *Bivens* claim for damages could be brought under the Social Security Act; she failed even to cite *Smith v. Robinson*, 468 U.S. 992 (1984), or *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981), the cases upon which the Secretary now relies. The state officials, raising the same argument, cited a footnote in *Suter, supra*, and noted that the *Suter* court had in turn cited *Smith v. Robinson, supra* and *National Sea Clammers, supra*. State's Petition for Rehearing at 4.

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[9] The state petitioner, but significantly, not the Secretary, argues that the decision of the Court of Appeals "is inconsistent with this Court's decision in *Suter v. Artist M.*, _ U.S._, 112 S. Ct. 1360 (1992)." State Pet. at 10. In *Suter*, this Court found that Congress had not established a federal right enforceable by section 1983. The state's reliance on *Suter* is misplaced, since the Social Security Act clearly contains enforceable federal rights.

[10] In his opening brief, the Secretary had discussed the comprehensive scheme created by Congress to review individual disability decisions (42 U.S.C. § 405(g)), but only in connection with her argument opposing mandamus jurisdiction under 28 U.S.C. § 1361. As in the district court, the Secretary did not address the court's jurisdiction over the claims against the state agency at all.

Even if petitioners managed to preserve the argument by making it, however inadequately, in their petitions for rehearing, the Eighth Circuit did not address this issue. Furthermore, none of the other circuits has addressed the issue. This Court should not grant review to address an issue that has not been decided by a single circuit. *See Califano v. Yamaaski*, 442 U.S. 682, 702 (1979) (preferable to allow several circuits to pass on a claim to gain benefit of analysis of different courts).

Petitioners' arguments are, in any event, plainly wrong. This Court has repeatedly held that section 1983 should be broadly construed. *E.g., Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 105 (1989). Consistent with this principle, the "burden to demonstrate that Congress has expressly withdrawn the [1983] remedy is on the defendant." *Id.* at 107; *see Wilder v. Virginia Hospital Assoc.*, 496 U.S. 498, 520-21 (1990).

This burden is very difficult to meet. This Court has repeatedly cautioned that it will "not lightly conclude that Congress intended to preclude reliance on section 1983 as a remedy for the deprivation of a federally secured right." *Wilder*, 496 U.S. at 520; *Golden State Transit*, 493 U.S. at 107; *Wright v. Roanoke Redevelopment & Hous. Auth.*, 479 U.S. 418, 423-24 (1987); *see also Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Absent an express statutory provision precluding section 1983 enforcement, the Court has "found private enforcement foreclosed only when the statute itself creates a remedial scheme that is 'sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under § 1983.'" *Wilder*, 496 U.S. at 521 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S 1, 20 (1981)). Petitioners cannot meet their burden by showing that the statute includes a remedial mechanism different from enforcement under § 1983; rather, "the statutory framework must be such that '[a]llowing

plaintiff' to bring a § 1983 action 'would be inconsistent with Congress' carefully tailored scheme.'" *Golden State Transit*, 493 U.S. at 107 (quoting *Smith*, 468 U.S. at 1012 (emphasis added)). The statute must "leav[e] no room for additional private remedies." *Suter v. Artist M.*, _ U.S. _, 112 S. Ct. at 1368 n.11 (1992).[11]

The petitioners point to two separate administrative schemes in an effort to show that Congress intended to foreclose a section 1983 action against the state agency. First, they point out that the Secretary maintains performance standards for the state agencies and may take over the task of making initial and reconsideration decisions if the state agency substantially fails to comply with the Secretary's policies. Sec. Pet. at 19; State Pet. at 11. Second, they rely on the administrative review process under section 405(g) whereby a claimant can appeal the denial of a claim for benefits. These administrative schemes fail to establish Congress's intent to foreclose a section 1983 action against the state agency under the circumstances presented here.

The ability of the Secretary to take action against a state DDS office when the Secretary deems it appropriate is of little comfort to respondents. Social Security claimants cannot trigger any action by the Secretary under this remedial scheme. In fact, there is not even a mechanism for claimants to participate in the Secretary's review of a state agency's practices. *Cf. Wright*, 479 U.S. at 426; *Rosado v. Wyman*, 397 U.S. 397, 406 n.8 (1970). Furthermore, although the Secretary is required to review 50 percent of DDS decisions which are favorable to claimants, there is no parallel requirement to review unfavorable

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[11]Applying these principles, this Court has found that a comprehensive remedial scheme is sufficient to demonstrate Congressional intent to foreclose a section 1983 action on only two occasions. *See Smith v. Robinson*, 468 U.S. 992 (1984); *Middlesex County Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1 (1981).

decisions, like those at issue here.[12] Finally, to the best of our knowledge, the Secretary has never exercised the statutory authority to take over the responsibilities of a DDS office. Clearly, this does not approach the kinds of comprehensive remedial schemes found to evidence Congress's intent to foreclose a section 1983 action in *Smith* and *Sea Clammers*.

Nor does a claimant's ability to appeal the denial of a claim for benefits evidence Congress's intent to foreclose a section 1983 action which seeks to challenge the procedures used by a state DDS agency at the initial and reconsideration levels only. At the ALJ level, an appeal under 42 U.S.C. § 405(g) determines one thing and one thing only - whether the claimant is eligible for benefits. The appeal from the state agency decision is *de novo*; the state agency is not a party; the sole issue is eligibility for benefits. An administrative appeal under section 405(g) simply does not encompass a claim that the state DDS agency has systematically violated federal law or the Constitution.

Section 405(g) enables a claimant to bring an action against the Secretary in district court to challenge an unfavorable final decision made after a hearing; it does not on its face authorize an action against the state agency. Even if the state agency were a proper defendant under section 405(g), which petitioners do not concede, a claimant who has received a decision following a hearing would be unable to challenge the procedures used by the state agency only at the initial and reconsideration levels. If the claimant were denied benefits at the ALJ level, he could no longer claim that DDS policies are the proximate cause of his injury. If the claimant were awarded benefits at the ALJ level and nonetheless files a complaint under section 405(g), the government would surely seek dismissal for lack

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[12]Respondents attempted to find out what percentage of DDS denials and terminations are reviewed by the Secretary, but the deposition witness did not know. Klemann deposition, Vol. II at 252. This question, like many others, awaits further discovery.

of standing. *Cf. Sullivan v. Finkelstein*, 496 U.S. 617, 625 (1990) (there would be "grave doubt" whether the Secretary could appeal adverse district court judgment after award of benefits by ALJ on remand). In short, a remedial scheme which fails to provide any remedy at all against the state actor cannot possibly be considered sufficiently comprehensive to evidence Congress's intent to foreclose a section 1983 action. *Cf. Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, 522-23 (1990).[13]

III. The Petition Should Be Denied as to the Section 405(h) Question.

The state petitioners ask this Court to grant their petition for certiorari with respect to whether they are protected from suit by 42 U.S.C. § 405(h)]. State Pet. at i, 13-14.[14] Section 405(h) precludes certain actions against "the United States, the Secretary, or any officer or employee thereof." The Eighth Circuit, relying on the plain language of the statute, concluded that section 405(h) did not apply to the state DDS officials. Sec. Pet. App. 16a-17a.

Petitioners do not claim that there is any split among the circuits as to this question, or that the question is an important one. Their sole argument is that the Eighth Circuit's decision produces a result not intended by Congress. State Pet. at 13. There is simply no basis for granting review as to this question.

The state petitioners concede that the Eighth Circuit's reading of section 405(h) was "literally correct." *Id.* The only way section 405(h) can be read to apply to

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[13]In contrast, the administrative scheme under 405(g) would indicate Congress' intent to foreclose a section 1983 action by a Social Security claimant seeking only reversal of the denial of his claim for benefits. *See supra* p. 13.

[14]The Secretary does not state this issue as a separate 'Question,' but does argue that section 405(h) precludes a section 1983 claim against the state DDS officials. Sec. Pet. at 20.

actions against state agency officials is if they are considered to be "the Secretary" as used in the statute. If state DDS officials are considered to be "the Secretary" for purposes of section 405(h), then surely they are also "the Secretary" for purposes of section 405(g), which creates a cause of action against the Secretary. To argue, as petitioners do, that section 405(h) precludes respondents' claims against the state officials without admitting that section 405(g) would permit these claims makes no sense. For the reasons set forth in Part II.A.2., *supra* pp. 11-14, whether respondents can proceed against the state petitioners under section 1983 or only under section 405(g) is of little importance to petitioners or respondents.

IV. The Petition Should be Denied as to Waiver of Exhaustion of Administrative Remedies Under Section 405(g).

Even if this Court grants the state's petition for a writ of certiorari, and grants the Secretary's petition for certiorari with respect to the first question presented, the Court should deny review of the second question she presents, namely whether the Court of Appeals properly relied on *Bowen v. City of New York*, 476 U.S. 467 (1986), to waive section 405(g)'s exhaustion requirement. *See* Sec. Pet. at i.

As an initial matter, the Secretary has not challenged the Eighth Circuit's conclusion that the district court had mandamus jurisdiction to consider respondents' claims. The existence of an alternative basis of jurisdiction renders the section 405(g) question unimportant.[15]

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[15]The Secretary misreads the Eighth Circuit's decision, asserting that the court of appeals "found it unnecessary to decide whether relief was also available under the mandamus statute . . . ." Sec. Pet. at 13 n. 7. In fact, although the court found it unnecessary to discuss mandamus jurisdiction, the court held that mandamus jurisdiction was available, vacated the district court's order dismissing mandamus jurisdiction, and specifically directed the district court to consider the propriety of a mandamus order, relying on its decision in *Mental Health Ass'n v. Heckler*, 720 F.2d 965, 971 n.17 (8th Cir. 1983). Sec. App. 15a.

Even if mandamus jurisdiction were not available, this Court should deny review of the section 405(g) question. There has been no disagreement among the circuits about the scope of *City of New York*.[16] The courts of appeals have uniformly rejected the Secretary's efforts to rewrite the *City of New York* decision to limit class action challenges to the administration of the Social Security disability programs.[17] The Secretary is trying to relitigate the issues fully settled by *City of New York* only seven years ago in an attempt to insulate entire levels of agency decision-making from judicial review.

Furthermore, there has not been a proliferation of class actions against the Secretary. In fiscal year 1991, there were nearly two million initial determinations on disability claims. During the same time period, there were 4,869 federal district court decisions on disability claims. 1992 Green Book at 61. A Westlaw search identified only ten district court decisions in fiscal year 1991 in class actions filed under 42 U.S.C. § 405(g).[18] Clearly, Social Security claimants themselves as well as the courts have followed the

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[16]*Grant v. Shalala*, No. 91-5675 (3d Cir. March 5, 1993), decided after the petitions' for certiorari were filed here, is not to the contrary. In *Grant*, a class of Social Security claimants challenged the impartiality of one particular ALJ. The Third Circuit distinguished *City of New York* and other cases which challenge a practice or policy of the Social Security Administration. Slip. op. at 25, 28 n.15.

[17]In addition to the cases cited by the Solicitor General from the Third, Fourth, Seventh, Ninth and District of Columbia Circuits, see Sec. Pet at 27 n. 19, the Second and Eighth circuits have rejected his arguments. *See New York v. Sullivan*, 906 F.2d 910 (2d Cir. 1990); *Polaski v. Heckler*, 751 F.2d 943 (8th Cir. 1984), *remanded* 476 U.S. 1167 (1986), *on remand*, 804 F.2d 456 (8th Cir. 1986), *cert. denied*, 482 U.S 927 (1987).

[18]Social Security claimants have prevailed on the merits of most if not all of the class actions in which exhaustion has been waived. Were it not for waiver of exhaustion, the Secretary would have been permitted to violate the mandates of the Social Security Act with virtual immunity, to the detriment of thousands of disabled children and adults. *See, e.g., Sullivan v. Zebley*, 493 U.S. 521 (1990).

admonition from this Court in *City of New York* that "exhaustion is the rule in the vast majority of cases." *See* 476 U.S. at 486.

The Secretary's efforts to distinguish this case from *City of New York* are plainly erroneous. She argues that exhaustion should not have been waived in this case because respondents have not established the existence of a clandestine policy. The claimants in *City of New York*, after a seven-day trial, proved the existence of a clandestine policy. This Court relied on the existence of a clandestine policy solely to toll the limitations period for class members whose administrative claims had lapsed before the class action complaint was filed. *City of New York*, 476 U.S. at 480-82. Respondents here moved for certification of a class whose members all had live claims at the time they filed their complaint. C.A. App. 126-27. Neither this Court nor any court of appeals has held that a clandestine policy is necessary or even relevant to the decision to waive exhaustion of administrative remedies for claimants with live claims.[19] *See* 476 U.S. at 482-486.

The *City of New York* decision relied heavily on *Mathews v. Eldridge*, 424 U.S. 319 (1976), in which this Court first discussed judicial waiver of exhaustion of administrative remedies under section 405(g). In *Eldridge*, the plaintiff had challenged the failure of the Secretary to provide pretermination hearings. Although there was nothing secretive about the Secretary's regulations governing the appeal process, this Court nevertheless concluded that it was proper to waive the exhaustion requirement. The *City of New York* decision adopted the *Eldridge* analysis, cautioning that the *Eldridge* factors should not be applied mechanically. *City of New York*, 467 U.S. at 484. There is no support for the Secretary's

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[19]*See Marcus v. Sullivan*, 926 F.2d 604, 614-15 (7th Cir. 1991); *Bailey v. Sullivan*, 885 F.2d 52, 65 (3d Cir. 1989); *Hyatt v. Heckler*, 807 F.2d 376, 379-80 (4th Cir. 1986), *cert. denied*, 484 U.S. 820 (1987).

argument that, in *City of New York*, this Court established an additional requirement, allowing waiver of exhaustion only when claimants challenge a secretive policy.

The Secretary's attempt to distinguish this case from *City of New York* with respect to the futility of exhaustion is also seriously flawed. Exhaustion would be futile here for precisely the same reasons it was futile in *City of New York*. The policies which the claimants challenged in *City of New York*, just like the policies challenged here, were applied only at the initial and reconsideration level.[20] *See City of New York* v. *Heckler*, 578 F. Supp. 1109, 1115-16 (E.D. N.Y. 1984). Here, as in *City of New York*, the "errors" which respondents seek to correct are the practices and procedures employed by the state agency officials in the cases of all class members, regardless of the facts presented by any particular claimant. An appeal by an individual claimant to an ALJ may result in the award of benefits, but it never removes or corrects the systemic errors that respondents challenge.

The Secretary argues that exhaustion would not be futile here because a claimant who pursues his administrative remedies will eventually be evaluated properly by an ALJ, and may be awarded benefits. The question, however, is not whether a claimant will eventually be evaluated properly and awarded benefits; the question is whether there is any realistic possibility that the Secretary would alter an established policy at the behest of a single claimant in an individual appeal. *See Eldridge*, 424 U.S. at 330. Under the procedures challenged in *Eldridge*, Social Security claimants who exhausted their administrative procedures eventually obtained adequate due process hearings. This Court approved

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[20]Indeed, in its brief to this Court in *City of New York*, the Secretary emphasized that: "The internal SSA memoranda reflecting the interpretation of the regulations that respondents challenged concededly were not binding upon the ALJs or the Appeals Council." C.A. Supp. App. at 13.

the waiver of exhaustion, however, where "denying Eldridge's substantive claim 'for other reasons' or upholding it 'under other provisions' at the post-termination stage . . . would not answer his constitutional challenge." 424 U.S. at 331-32 (quoting *Weinberger v. Salfi*, 422 U.S. 749, 762 (1975)).

As in *Eldridge* and *City of New York*, denying or upholding respondents' claims for benefits at the ALJ stage does not answer their claim that the practices and procedures employed at the initial and reconsideration levels are illegal. Most disability claimants lack the personal resources to pursue an appeal to the hearing stage.[21] Yet all claimants, as Congress has mandated, are entitled to uniform standards throughout the administrative process. 42 U.S.C. § 421(k)(1). If exhaustion is not waived, "SSA could operate indefinitely . . . with two standards . . ., one for claimants who seek review . . ., and one for claimants who do not." *Jones v. Califano*, 576 F.2d 12, 19 (2d Cir. 1978). As this Court stated in *City of New York*: "We should be especially sensitive to this kind of harm where the Government seeks to require claimants to exhaust administrative remedies merely to enable them to receive the procedure they should have been afforded in the first place." 476 U.S. at 484.

The Secretary's discussion of the irreparable harm requirement similarly finds no support in any court decision. She suggests that only where going through the administrative appeal process could cause a 'severe medical setback,' as in *City of New York*, should exhaustion be waived. Sec. Pet. at 24-25. Although there were allegations that the plaintiffs in *City of New York* would suffer severe medical setbacks if they were required to exhaust their administrative remedies, this is not the only kind of irreparable harm that

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[21]Only one third of the disability claimants whose applications are denied appeal to the ALJ level. 1992 Green Book at 61.

justifies waiver. In *Eldridge*, 424 U.S. at 331, for example, this Court approved waiver of exhaustion where the claimant "has raised at least a colorable claim that because of his physical condition and dependency upon the disability benefits, an erroneous termination would damage him in a way not recompensable through retroactive payments." And in *Schweiker v. Chiliky*, 487 U.S. 412, 428 (1988), this Court recognized that "months of delay in receiving [Social Security] income on which one has depended for the very necessities of life cannot be fully remedied by the 'belated restoration of back benefits.'" The record in this case is replete with uncontradicted evidence of the ways in which the many months of delay causes class members to suffer not only economic loss, but also irreparable physical and emotional harm. (C.A. App. 128-248.)

Finally, with respect to the collateral nature of the relief sought, the Secretary does not even pretend that the Eighth Circuit's decision was inconsistent with *City of New York*. Rather, she ignores the controlling decision and asserts that "the standard for determining whether a claim is 'collateral' for purposes of dispensing with Section 405(g)'s exhaustion requirement should . . . approximate the stringent standard developed for the 'collateral order' doctrine of appellate review enunciated in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)." Sec. Pet. at 26.

No court has ever applied the collateral order doctrine of *Cohen* to the waiver of exhaustion analysis. In fact, in *City of New York*, the lower court had recognized that the plaintiffs' claims were not wholly collateral to their claims for benefits, but rather the two were "somewhat intertwined". *City of New York v. Heckler*, 742 F.2d 729, 736-37 (2d Cir. 1984). Nonetheless, this Court affirmed the lower court's decision that the plaintiffs' claims were sufficiently collateral to support waiver of exhaustion. The Secretary is actually urging

this Court to substantially alter if not overrule its decision in *City of New York*. If the Secretary's arguments on collaterality were adopted, waiver of exhaustion of administrative remedies would be foreclosed in virtually every case challenging the standards used to determine disability claims.

There is absolutely no basis for this Court to issue a writ of certiorari to review the section 405(g) question raised by the Secretary.

CONCLUSION

For the foregoing reasons, the petitions for a writ of certiorari should be denied.

Dated this 14th day of July, 1993.

Respectfully submitted,

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ORIGINAL

Supreme U.S.
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Nos. 92-1392 and 92-1395

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

DONNA E. SHALALA, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

WALTER ROERS, in his official capacity as Director of the Disability Determination Services; R. JANE BROWN, in her official capacity as Commissioner of the Minnesota Department of Jobs and Training, PETITIONERS,

v.

DANIEL J. SCHOOLCRAFT, ET AL., RESPONDENTS.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

CERTIFICATE OF SERVICE

I, Laurie N. Davison, a member of the Bar of this Court, hereby certify that on this 14th day of July, 1993, one copy of a Motion for Leave to Proceed in forma pauperis, Declarations of Daniel J. Schoolcraft, Joseph L. Drumbeater and Kathleen M. Davis, and

Respondents' Brief in Opposition in the above-entitled case were mailed, first class postage prepaid, to:

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I further certify that all parties required to be served have been served.

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July 14, 1993

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SUPREME COURT, U.S.

William K. Suter
Clerk of the Supreme Court
United States Supreme Court
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Washington, D.C. 20543

Re: ***Shalala v. Schoolcraft; Roers v. Schoolcraft***
Nos. 92-1392; 92-1395

Dear Mr. Suter:

Enclosed please find a Motion for Leave to Proceed In Forma Pauperis, Declaration of Daniel J. Schoolcraft, Joseph L. Drumbeater and Kathleen M. Davis, the original and twelve copies of Respondents' Brief in Opposition, and a Certificate of Service.

Very truly yours,

LEGAL AID SOCIETY OF MINNEAPOLIS

L N. D

Laurie N. Davison
Litigation Director

LND:bbo

Enclosures

United Way Agency